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No. 94-0378

In The

Supreme Court of the United States

October Term, 1994

JOHN L. MARSILIO,

Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

Petitioner seeks a determination that the regulation designated as § 33.125(b) of the Public Utility Commission Code of Pennsylvania (hereinafter "Pa. Code") was not preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. § 434 (hereinafter, FRSA) or the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* (hereinafter, "FELA"). Petitioner's contention in this respect is predicated upon proof that the Pennsylvania Public Utility Commission was, at the time of the accident in suit, a state agency which, pursuant to 45 U.S.C. § 435, was designated by the Secretary of Transportation as participating in surveillance and investigative activities. *See* 45 U.S.C. § 437. Proof of this relationship was never offered in the District Court. Further, evidence tending to establish this claim was not included in Petitioner's Appendix before the Court of Appeals nor did Petitioner file a motion before the Court of Appeals requesting leave to supplement the record. On the contrary, Petitioner sought to prove his contention by simply appending unauthenticated documents to his Brief before the Court of Appeals and designating same as a Supplemental Appendix. Respondent, in its Reply Brief, objected to Petitioner's attempt to supplement the record in this respect as constituting a flagrant violation of the Rule 10(e) of the Federal Rules of Appellate Procedure. The Court of Appeals apparently declined to consider the subject material and the related issue of preemption, and affirmed the verdict of the court below without opinion.

Petitioner's claim of trial error merely involves *de minimis* semantic distinctions gleaned from the court's charge. Petitioner complains that the court failed to charge in accordance with the PUC regulation that the railroad must maintain walkways between tracks "in a reasonably suitable condition" rather than "in a reasonably safe condition" in accordance with the duty imposed by the FELA. Any error in this respect was harmless.

There is no conflict between the Circuits as alleged. Decisional variations between the Circuits are attributable to variations in proofs presented in the District Courts.

Additionally, this Court's decision in *CSX Transp. Inc. v. Easterwood*, __ U.S. __, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993) resolved conflicts related to the issue Petitioner seeks to raise.

COUNTERSTATEMENT OF THE CASE

Petitioner, John L. Marsilio, brought this action pursuant to the Federal Employers' Liability Act (hereinafter, "FELA"), 45 U.S.C. § 51, *et seq.*, for injuries sustained by him in a fall in the course of his employment by Consolidated Rail Corporation (hereinafter, "Conrail"). At the trial in the District Court Petitioner sought to introduce into evidence a regulation designated as § 33.125(b) of the Public Utility Commission Code of Pennsylvania (hereinafter, "Pa. Code"). Petitioner further claimed that a violation of same constituted negligence *per se* which would preclude Respondent from asserting the defense of contributory negligence pursuant to the provisions of the FELA. The regulation itself provides that the space between railroad tracks which railroad employees use as walkways "shall be kept in a reasonably suitable condition for such purpose". The District Court declined to charge pursuant to the precise language of the Pa. Code and opted to charge in accordance with the standard imposed by the FELA that the Respondent's duty with respect to areas between its tracks was to "maintain and keep such place of work in a reasonably safe condition". The jury empaneled to try the matter rendered a verdict in favor of Conrail. Petitioner appealed to the United States Court of Appeals for the Third Circuit which affirmed the judgment of the District Court without opinion.

In order to assert the claim that the subject Pa. Code Regulation had the force and effect of a statute, it was necessary

that Petitioner prove that the Pennsylvania Public Utility Commission was, pursuant to 45 U.S.C. §§ 435 and 437, a state agency approved to participate in the "investigative and surveillance" activities articulated by the FRSA. However, no evidence was presented on this issue in the District Court. Petitioner also failed to make note of any material related to this matter in the Appendix filed in the Court of Appeals. Nevertheless, without leave of court or notice to Respondent, Petitioner attached to his Brief before the Court of Appeals a Supplemental Appendix which contained copies of unauthenticated documents which Petitioner asserts prove his contention. Respondent, in its Brief before the Court of Appeals, objected to the consideration of this material as same was not only not presented to the District Court nor included in Petitioner's Designation of Appendix in the Court of Appeals, but consisted of copies of unauthenticated, unexplained documents which Petitioner contends establish a significant relationship between the Commonwealth of Pennsylvania and the United States Department of Transportation. The Court of Appeals affirmed the judgment of the District Court without opinion.

REASONS FOR DENYING THE WRIT

I.

THE RECORD FAILS TO ESTABLISH THAT EVIDENTIARY MATERIAL ESSENTIAL TO PETITIONER'S CONTENTION RELATING TO PREEMPTION WAS PROPERLY PRESENTED TO OR CONSIDERED BY THE COURTS BELOW OR THAT THE ISSUE OF PREEMPTION WAS DECIDED BY THE COURT OF APPEALS.

Petitioner notes that the express language of the Federal Employers' Liability Act provides in pertinent part:

> All orders, rules, regulations, standards, and requirements in force, or prescribed or issued by the Secretary under this subchapter, or by any State agency which is participating in investigative and surveillance activities pursuant to section 435 of this title, shall have the same force and effect as a statute for the purposes of the application of sections 53 and 54 of this title, relating to the liability of common carriers by railroad for injuries to their employees.

45 U.S.C. § 437(c).

Thus, a threshold requirement for Petitioner's maintenance of his current position is proof that, on the date of the accident in suit, to-wit; March 20, 1990, the Pennsylvania Public Utility Commission was, in fact, an approved participant in investigative and surveillance activities. This matter was never mentioned in the District Court. Petitioner, in designating his Appendix before the Court of Appeals, never referenced this matter. The initial evidentiary reference to this condition precedent appears in a Supplemental Appendix attached to Petitioner's Brief. Said Supplemental Appendix contains a photocopy of an unsigned letter with a date stamp of March 5, 1990 from J.W. Walsh, Associate Administrator for Safety to Kenneth E. Nicely, Director of Bureau of Safety and Compliance, indicating *inter alia,* that Mr. Walsh had approved the PUC "FY 1990 Application for participation in the Federal Railroad Administration's (FRA) State Participation Railroad Track, Motive Power and Equipment, and Operating Practices Safety Inspection Programs," and indicated that "no federal grant funds were appropriated by Congress for this program in FY 1989 and FY 1990". One of the documents contained a date which is crossed out and replaced by the handwritten notation of March 5, 1990. The document which

purports to be a copy of the Commonwealth's application indicates on its face that the Commonwealth did not seek participation in the "signal and control" categories of the Federal Railroad Safety Program. Additional unauthenticated and equally unexplained documents are attached to the Petitioner's purported "Supplemental Appendix."

There is no indication whatsoever that the Court of Appeals considered the complained of evidentiary matter or reached the issue of preemption. The inclusion of this evidentiary material in a Supplemental Appendix attached to Petitioner's Brief clearly and flagrantly violated Rule 10(e) of the Federal Rules of Appellate Procedure relating to correcting or modifying the record before the Court of Appeals. Respondent strenuously objected to Petitioner's improper attempt to modify the record and in its Reply Brief stated:

> No argument or evidence was presented to the trial court in this matter. It was not until the filing of Appellant's Brief in this appeal that any argument or substantive material in the form of the unauthenticated documents attached to Appellant's Supplemental Appendix made reference to this contention. Hence, this issue can not be raised on appeal. In this respect, we also note that the documents attached to Appellant's Brief as a Supplemental Appendix are not authenticated; dates have been changed on the face of one document; and the custodians and/or signatories have not had the opportunity to be subject to cross-examination.
>
> Appellee requests that this court decline to consider this improperly filed "Supplemental Appendix". New evidence cannot be presented

> in this manner at this time in the litigation. As a result of the highly unusual and inappropriate attempt to submit this evidence, appellee contends that the "Supplemental Appendix" must be stricken from the record. See, *Gravenmier v. U.S.*, 399 F.2d 677, 678 n. 1 (9th Cir. 1968); *U.S. v. Nash*, 342 F.2d 326 (6th Cir. 1965). Consequently, appellee requests that Point I C of Appellant's Brief be stricken, as it totaly relies upon the improper and unauthorized Supplemental Appendix.

Appellee's Reply Brief in Court of Appeals pages 13-14.

Inasmuch as the Decision in the Court of Appeals was not clarified by an opinion, it appears that the court declined to consider the issue which Petitioner now seeks to raise by Writ of Certiorari and followed the practice it articulated in *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89 (3rd Cir. 1990), citing and quoting *Ross v. Kemp*, 785 F.2d 1471, at 1475 (11th Cir. 1986) that supplemental material will not be considered when "a party has filed supplemental material without requesting leave of th(e) court or has appended material to an appellate brief without filing a motion to supplement." Respondent, therefore, suggests that the Court of Appeals did not consider Petitioner's contention in this respect and followed the time-honored principle that courts should not reach out to decide constitutional issues which are not properly before it or necessary for the resolution of the controversy. Certainly it cannot be assumed, as Petitioner contends, that the Court of Appeals ruled on this issue. Inasmuch as the record does not clearly establish that the issue of preemption was properly raised in or considered by the Court of Appeals, this Court should not grant the Writ, as the record does not and can not establish that matters fundamental to the court's adjudication were raised in or considered by the courts

below. *Hines Yellow Pine Trustees v. Martin, et al.*, 268 U.S. 458, 45 S. Ct. 543, 69 L.E. 1050 (1925); *Freeman v. Bee Machine Co., Inc.*, 319 U.S. 448, 63 S. Ct. 1146, 87 L.E. 1509 (1943); *Brooks v. United States*, 337 U.S. 49, 69 S. Ct. 918, 93 L.E. 1200 (1949); *McMahon v. United States*, 342 U.S. 25, 72 S. Ct. 17, 93 L.E. 26 (1951); *Adickes v. S.H. Kress Company*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

II.

ANY ERROR WAS, IN FACT, HARMLESS.

Regardless of the relevance of the PUC regulation, the court's election to charge pursuant to the comparable and similar standards of the FELA renders Petitioner's claim harmless error at best.

The court's charge to the jury on the issue of negligence and the standard of care was as follows:

> Every common carrier by railroad, or in this case, every railroad, while engaging in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . .
>
> It was the continuing duty of the defendant, as an employer, at the time and place in question, to use ordinary care under the circumstances, in furnishing the plaintiff with a *reasonably safe place* in which to work, and to

> use ordinary care under the circumstances to *maintain and keep such place of work in a reasonably safe condition.*
>
> An employer must make proper inspections to discover dangers in places where employees must work. And after ascertaining there [sic] existence, must take reasonable precautions for the safety of the employees and the employees have the right to rely on the performance of the duty by the employer and have a right to govern their actions accordingly.

(Emphasis added) (A. 321-322).

The standard articulated in Pa. Code § 33.125(b) imposes a duty on railroads to maintain the areas between tracks where its trackmen work "in a reasonably suitable condition for such purpose." This standard is mirrored and subsumed in the court's charge imposing a duty requiring Respondent to "*maintain and keep such place of work in a reasonably safe condition.*" (A. 322). The difference between the PVC regulation and the stringent duty requirements of the FELA is *de minimis,* at most. In fact, the duty imposed by the FELA upon the railroad appears to be greater. Clearly, no constitutional issue or issue of public significance is raised by the court electing to charge in accordance with the approved time-honored mandates of the FELA. As a result of the congruence of the court's charge and the regulation in question, even if the District Court improperly excluded the PUC regulation, the error would not have effected the judgment and, is, therefore, harmless. *McQueeney v. Wilmington Trust Co.,* 779 F.2d 916 (3d Cir. 1985).

III.

THE CASE AT BAR IS NOT IMPLICATED IN A CONFLICT BETWEEN THE CIRCUITS.

This case is not implicated in any alleged conflict between the Circuits on the constitutional issue of preemption as the record does not reveal that the court below reached the issue of preemption. The conlcusion that the Court of Appeals adjudicated a significant constitutional issue without opinion is also defeated by the fact that the matter before the Court involves the resolution of whether or not a jury instruction properly defined the respective duties of the parties. Unlike the cases relied upon by Petitioner to generate a false conflict between the Circuits, this case does not involve comprehensive state regulations concerning construction, elevation or surface requirements of walkways between tracks. *See and compare, Missouri Pacific Railroad Company v. Railroad Commission of Texas,* 833 F.2d 570 (5th Cir. 1987), *remanded,* 823 F. Supp. 1360, *affirmed,* 948 F.2d 179 (5th Cir. 1991) and *Southern Pacific Transportation v. Public Utilities Commission,* 647 F. Supp. 1220 (N.D. Cal. 1986), *aff'd,* 820 F.2d 1111 (9th Cir. 1987) (per curiam).

IV.

THERE IS NO CURRENT CONFLICT BETWEEN THE CIRCUITS.

Petitioner relies upon the case of *Missouri Pacific Railroad Company v. Railroad Commission of Texas,* 833 F.2d 570 (5th Cir. 1987) and claims that it is in conflict with the Ninth Circuit's decision in *Southern Pacific Transportation v. Public Utilities Commission,* 647 F. Supp. 1220 (N.D. Cal. 1986), *aff'd,* 820 F.2d 1111 (9th Cir. 1987) (per curiam). The regulations in question in each of these cases and the case at bar have been characterized as

walkway regulations. However, the regulation in the case at bar simply attempts to articulate a general standard of care and differs fundamentally from those construed in *Southern Pacific* and *Missouri Pacific, supra.*

The regulations construed in *Southern Pacific, supra,* were summarized by the District Court as follows:

> In 1948, CPUC adopted General Order No. 26-D. This order prescribes the minimum distances (clearances) railroads must maintain between freight cars and structures located above and beside railroad tracks and between parallel tracks. The part of the order challenged here provides that, with certain exceptions, "[t]he minimum distance between center lines of parallel standard gauge tracks shall be fourteen (14) feet." The order applies to tracks constructed or reconstructed after its effective date.
>
> General Order No. 118 was adopted in 1963. That order requires railroads to maintain a two-foot wide continuous walkway on each side of their tracks. The order provides that "walkways shall provide a reasonable, regular surface with gradual slope not to exceed one inch to eight inches."

647 F. Supp. 1220 at p. 1222 (1986).

The regulations construed by the Fifth Circuit in *Missouri Pacific Railroad v. Railroad Commission of Texas, supra,* required that walkways between tracks must be "smooth, maintained, properly sloped walkways which are level with the tops of the ties

along both sides of all tracks within railyards and the tracks adjacent thereto, in an effort to provide safer working conditions for employees working on or about the tracks". *Missouri Pacific,* 833 F.2d at 574. However, the precise holding in *Missouri Pacific* cited by Petitioner is articulated in the court's statement that "we believe there is a material fact issue concerning the interrelationship between the state walkway requirements and federal track regulations. *Id.* at 575. Consequently, the matter was remanded for further proceedings. Upon remand, the District Court, after hearing, made detailed findings of fact and concluded that preemption had, in fact, occurred. *See Missouri Pacific R.R. Co. v. Railroad Commission of Texas,* 833 F. Supp. 1360, *aff'd,* 948 F.2d 179 (5th Cir. 1991).

A review of the cases cited by Petitioner and those referenced in the Briefs before the Court of Appeals does not reflect a fundamental conflict between the Circuits as to the applicable law. The variations in result are attributable primarily to variations in proofs before the District Courts. This is clearly not a matter for review by a Writ of Certiorari.

V.

THE SUPREME COURT IN *CSX TRANSPORTATION, INC. V. EASTERWOOD*, __ U.S. __, 113 S. CT. 1732, 123 L. ED. 2D 387 (1993) RESOLVED EXISTING CONFLICTS BETWEEN THE CIRCUITS RELATING TO FRA PREEMPTION AND NO FURTHER CONFLICTS HAVE BEEN NOTED.

This Court decided the case of *CSX Transportation, Inc. v. Easterwood,* __U.S. __, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1933) on *April 21, 1993. CSX Transportation v. Easterwood, supra* represented a comprehensive statement of the principles involved in considering the matter of FRA preemption. Cases cited and

relied upon by Petitioner predate *Easterwood*. There appears to be no conflict or confusion in the federal Circuits concerning the appropriate standards to apply with respect to matters involving properly raised FRA preemption issues subsequent to *Easterwood*. Therefore, issuance of the Writ of Certiorari is not warranted.

CONCLUSION

For the reasons stated above, Respondent prays that your Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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